STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2011
v	No. 296109 Macomb Circuit Court
JAMES A. PARKER, Defendant-Appellant.	LC No. 09-000739-FH

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to first-degree home invasion, MCL 750.110a(2), and pleaded guilty to receiving or concealing stolen property valued between $200 and $1,000, MCL 750.535(4)(a). He was sentenced to concurrent prison terms of six to twenty years for the home invasion conviction and one to five years for the receiving or concealing conviction. He appeals by delayed leave granted. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In addition to the first-degree home invasion and receiving or concealing charges, defendant was also charged as a fourth habitual offender, MCL 769.12. Pursuant to a plea agreement, he pleaded no contest to the home invasion charge and pleaded guilty to the receiving or concealing charge in exchange for dismissal of the habitual offender notice. The agreement also included the prosecutor's sentence recommendation. The prosecutor stated, "We have a sentencing recommendation, which is six years to twenty years, and that is within the guidelines for that grid, and six years would be the bottom number."

At sentencing, the parties indicated that they had made a mistake in their preliminary scoring of the guidelines, and that correction of the error placed defendant in the E-I cell of the applicable sentencing grid, for which the minimum sentence range is 51 to 85 months. MCL 777.63. The prosecutor noted that the sentence recommendation was still six years, but he would not object if the court imposed a minimum sentence of five years. Defendant advocated for a downward departure from the probation department's recommended five-year minimum sentence. The trial court sentenced defendant to a prison term of six to twenty years for the home invasion conviction. Thereafter, defendant filed a motion for postjudgment relief, asserting that he had been promised a sentence at the "bottom of the guidelines." The trial court disagreed and denied the motion.

A trial court's decision on a postjudgment motion to withdraw a guilty plea is reviewed for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), aff'd 463 Mich 446 (2000).

A plea of guilty or no contest must be understanding, voluntary, and accurate. MCR 6.302(A). It is voluntary if the terms of any plea agreement are disclosed and the plea is the defendant's own choice, i.e., it is not tendered under threat or duress. See MCR 6.302(C). "Where a defendant's plea of guilty is induced by the prosecutor's promise relating to sentencing, the terms of that agreement must be fulfilled." *People v Swirles*, 206 Mich App 416, 418-419; 522 NW2d 665 (1994). When the promise is in the nature of a sentence recommendation, the court "may accept the guilty plea . . . , yet refuse to be bound by the recommended sentence. . . . However, the trial judge must explain to the defendant that the recommendation was not accepted by the court, and state the sentence that the court finds to be the appropriate disposition. The court must then give the defendant the opportunity to affirm or withdraw his guilty plea." *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982) (footnote omitted). Similarly, MCR 6.302(C)(3) provides that if the court accepts a plea tendered in exchange for a prosecutorial sentence recommendation without having considered the presentence report, it must advise the defendant that it is not bound by the recommendation and that if it elects not to follow it, the defendant will be allowed to withdraw his plea.

The trial court did not abuse its discretion in denying defendant's postjudgment motion. *Davidovich*, 238 Mich App at 425. The prosecutor stated at the plea proceeding, "We have a sentencing recommendation, which is six years to twenty years, and that is within the guidelines for that grid, and six years would be the bottom number." He plainly stated that the sentence recommendation was six to twenty years, not a sentence at the bottom of the guidelines range, whatever that might be. Rather, he explained that the minimum sentence of six years was within the guidelines range as determined by the parties, and that the recommended six-year minimum sentence was at the bottom of that range. At sentencing, the prosecutor explained, consistent with his statement at the plea proceeding, that he had recommended a minimum sentence of six years because it was at the bottom of the guidelines range and thus was more proportionate to defendant's role in the offenses than would be a sentence of more than six years.[1] Because the record does not support defendant's claim that the prosecutor agreed to recommend a sentence at the bottom of the guidelines range, whatever that happened to be, the trial court did not abuse its discretion in denying defendant's postjudgment motion.

[1] There is absolutely nothing in these statements to suggest that defendant was promised a minimum sentence less than his codefendant's minimum sentence.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood